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In The

Supreme Court of the United States

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

HAROLD FREEMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment to the U.S. Constitution compel a state court to conclude that a state pandering statute, which prohibits procurement of persons for purposes of prostitution, does not apply to the conduct of hiring and paying of performers to engage in sexual acts before a camera to produce a pornographic film?

2. Does the First Amendment protect the production of commercial pornographic films, unless the final film product is adjudged obscene, to the extent that hiring and paying performers to engage in hard-core sexual conduct in commercial films cannot be independently prosecuted for pandering regardless of whether the final film is obscene or not?

3. Does the U.S. Constitution, or do the decisions of this Court, compel a state court to reverse a state pandering conviction where the film which was produced by the defendant with the paid sexual performances alleged to constitute the procurement for prostitution was not alleged by the state, or found by the trial court, to be obscene?

4. Do the decisions of this Court compel a state court to consider on appeal that the hard-core pornographic film produced as a result of the sexual performances paid for by the defendant to be affirmatively "deemed not to be obscene" so that the conduct of the defendant in paying performers to engage in the sexual acts on film cannot be considered pandering for prostitution because the film was not found obscene?

5. Does the First Amendment, or do the decisions of this Court, require a state prostitution statute to be limited to sexual contact for the purpose of sexual arousal or gratification of only the customer or the prostitute so that the procurement of paid hard-core sexual conduct to produce a commercial pornographic film cannot be pandering for prostitution?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION

The People of the State of California, by and through their counsel, Ira Reiner, District Attorney for the County of Los Angeles, hereby petition this Honorable Court to issue a writ of certiorari to the Supreme Court of the State of California to review its

decision reversing the criminal conviction below in order to correct and reverse the erroneous resolution of federal constitutional issues involved in the reversal of the conviction by the state court.

OPINIONS BELOW

The decision of the Supreme Court of California for which review is sought is reported as People v. Freeman, 46 Cal.3d 419, 250 Cal. Rptr. 598, 758 P.2d 1128 (August 25, 1988) (Copy in Appendix B).

The Decision of the Court of Appeal for the Second District of California, Division 4, which affirmed the conviction and which was reversed by the Supreme Court of California, is reported as People v. Freeman, 198 Cal.App.3d 292, 233 Cal. Rptr. 510 (January 6, 1987) (Copy in Appendix C).

JURISDICTION

On August 25, 1988, the Supreme Court of California announced its decision in People v. Freeman, No. S000070. Pursuant to the California Rules of Court, Rules 24(a), 25(a), 27(a)&(b), a decision becomes final and a judgment entered in 30 days unless the court grants rehearing or extends its jurisdiction (for not more than 60 days) to consider rehearing. On September 9, 1988, within the time allowed for filing petitions for rehearing, a motion for leave to file a brief amicus curiae in support of a petition for rehearing by the People or, alternatively, in support of a rehearing granted by the court on its own motion before the decision becomes final was lodged as filed on behalf of Phil and Karen Applegate, parents of Colleen Applegate, deceased former hard-core film actress "Shauna

Grant", by their attorney James J. Clancy. No petition for rehearing was filed by the People, then represented by the Attorney General of California, within the 15 days allowed. On September 14, 1988, the Supreme Court of California, pursuant to its rules, docketed as filed the above referenced alternative motion, as if by intervening party, with the following journal entry: "Request of James J. Clancy of the court to grant rehearing on the court's own motion". On September 15, 1988, the court acted on the petition for rehearing by extending its jurisdiction with the following journal entry: "Time extended to grant or deny petition for rehearing to Oct. 24, 1988". See: Cal.Rptr. Advance Sheets, Vol. 252, No.4, Case History Table at p.44 (West, Nov. 25, 1988). On October 20, 1988, the court denied rehearing with an Order

which reads as follows: "The motion for this court to grant a rehearing on its own motion, filed September 14, 1988, is DENIED." (Justice Arguelles, who sat on the panel of the Court of Appeal which affirmed the trial court conviction in this case, did not participate in this Order.) This Order being the final action taken by the court, the Remittitur was issued by the clerk on October 21, 1988, making the decision of August 25 a final judgment as of October 20, 1988. (Journal entries reproduced at end of Appendix A, following opinion of Supreme Court of California.)

Therefore, pursuant to 28 U.S.C. Section 1257(3) and Rules 17.1 and 20 of this Court, this Petition is proper and timely as being within 60 days from the date of final judgment of the Supreme Court of California when rehearing was denied on October 20, 1988. See: 18

U.S.C. Section 3772; Bowman v. Loperena, 311 U.S. 262, 266 (1940); Dept. of Banking v. Pink, 317 U.S. 264, 266 (1942); Schacht v. U.S., 398 U.S. 58, 63-64 (1970); Marquette Nat. Bank v. First of Omaha Corp., 439 U.S. 299, 307 n.18 (1978).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment 1

Congress shall make no law ... abridging the freedom of speech, or of the press...

California Penal Code

The pandering statute, section 266i of the Penal Code, is reproduced in Appendix A. As set out by the court below in People v. Freeman, 758 P.2d at 1130, the relevant sections of this and

the related prostitution statute are as follows:

A. The Statutory Language

> The Pandering statute under which defendant was convicted provides in pertinent part: "Any person who: (a) procures another person for the purpose of prostitution ... is guilty of pandering, a felony...." (§ 266i) "Prostitution" is not defined in section 266i. Rather, the definition of "prostitution" derives from Penal Code section 647, subdivision (b): "'[P]rostitution' includes any lewd act between persons for money or other consideration."

STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, Defendant-Respondent Harold Freeman was charged in counts I through V with pandering, a violation of section 266i of the Penal Code. (C.T. pp. 123-128.)

Defendant pleaded not guilty. (C.T. p. 251.) Trial was by jury. (C.T. p. 314.) Defendant was found

guilty as charged in all five counts. (C.T. pp. 375-381.)

Probation was granted for a period of five years, and appellant was to spend the first ninety days in county jail. Defendant was also ordered to pay restitution pursuant to section 1203.04 of the Penal Code and section 13967(a) of the Government Code. Execution of the sentence and of the fine were stayed pending resolution of the appeal. (C.T. p. 382; R.T. pp. 809-811.)

Defendant appealed from the judgment. (C.T. p. 384.) The California Court of Appeal, Second Appellate District, Division Four, affirmed the conviction in the published opinion filed on January 6, 1987. Defendant's Petition for Rehearing was denied. Defendant filed a Petition for Review in the Supreme Court of California, which was granted on April

16, 1987. Defendant's conviction was reversed in the opinion of the court below on August 25, 1988.

LAW AND ARGUMENT

Reasons For Allowing The Writ

The ability of state law to prohibit the use of paid performers to engaged in sexual penetration for hard-core sex scenes in commercial pornography is a law enforcement and public policy issue of national importance. This is especially true of the pandering statute of the State of California since most of the hard-core pornographic movies, films, videos, and magazine pictures are produced in this State and distributed in violation of state and federal obscenity laws across the United States and to many foreign countries. See: U.S. Attorney General's Commission on Pornography,

U.S.D.O.J., Final Report, Vol.2 at 1366, 1048-50 (G.P.O. 1986). See also: Organized Crime in California (Report to the General Assembly by the Attorney General of California), State of California, Dept. of Justice (1984), at 6.

Petitioner submits that neither the First Amendment to the U.S. Constitution nor the decisions of this Court compel the Supreme Court of California to extend broad immunity to acts of procuring prostitution for production of pornographic films and yet the court below recited four times that it felt compelled to reverse Defendant Freeman's conviction on these federal grounds. Such reliance by the California Supreme Court on federal constitutional rights to immunize pandering by pornographers whose films have not been alleged or

found obscene should be corrected by this Court to prevent the manifest injustice inherent therein and the severe hardship to law enforcement efforts and the exercise of the state's police powers and public policy.

This Court has sought to correct such restrictive application of federal principles to state regulation, and this case deserves similar attention by this Court. See: Commonwealth of Massachusetts v. Oakes, No. 87-1651, cert. granted ___ U.S. ___, 108 S.Ct. 1994, 100 L.Ed.2d 226 (May 23, 1988) (set for argument Jan. 17, 1989); Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986); New York v. P.J. Video, Inc., 475 U.S. 868 (1986); New York v. Ferber, 458 U.S. 747 (1982); Cooper v. Mitchell Brothers, 454 U.S. 90 (1981); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981).

The court below had previously construed the prostitution statute to require arousal. The use of this construction in Freeman is not an independent state ground because its prior decision was also an overly restricted applications of federal principles. In this case, the interwoven state issue was admittedly dominated by First Amendment concerns and this Court can presume the state court below relied on the federal grounds and may infer that the state issue was insufficient to reverse the conviction, as noted in Freeman, 758 P.2d at 1128. See: Michigan v. Long, 463 U.S. 1032, 1043-44 (1983); New York v. Class, 475 U.S. 106, 109-10 (1986).

Another important reason for this Court to allow the writ is to resolve the direct conflict between the state opinion below and the federal ruling of

the Court of Appeals in U.S. v. Roeder, 526 F.2d 736, at 738 (10th Cir. 1975):

> The ultimate question is whether the fact that a movie was made and that payment was at least in part for this activity detracts from the fact that sexual acts were performed and that money was paid incident to the acts....
>
> We are of the opinion that the making of the movie does not serve to purge the transaction of its Mann Act character.

It would be appropriate herein for this Court to hold that state pandering and prostitution statutes need not involve arousal or gratification on the part of only the performers, when applied to producing commercial pornography, and that it is the element of payment of consideration which constitutes illegal prostitution activity rather than the intended sexual result. This Court should also hold that such pandering and prostitution are not expressions protected by the U.S. Constitution and the final film product

need not be alleged or found to be obscene for the underlying conduct to be prosecuted. This Court could then uphold the state pandering statute on its face or construe its reach to extend only to payment of performers for hard-core sexual conduct for purposes of producing matter intended for commercial and public dissemination. See: Frisby v. Schultz, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 420, at 430-31 (1988).

This Court has treated "hard-core pornography", especially where penetration is clearly visible, to be obscene as a matter of law. Limiting the reach of pandering statutes to hard-core sexual conduct for hire would not, therefore, infringe on legitimate First Amendment rights. See generally: "Hard-Core Pornography: A Proposal for a Per Se Rule", 21 U. Mich. J.L. Ref. 255 (1988).

Proposition of Law:

THE UNITED STATES CONSTITUTION AND THE DECISIONS OF THE UNITED STATES SUPREME COURT DO NOT PROHIBIT A STATE PANDERING FOR PROSTITUTION STATUTE FROM CRIMINALIZING THE CONDUCT OF HIRING AND PAYING MONEY TO PERFORMERS TO ENGAGE IN HARD-CORE SEXUAL CONDUCT FOR THE PURPOSE OF PRODUCING A COMMERCIAL PORNOGRAPHIC FILM REGARDLESS OF WHETHER THE FINAL FILM PRODUCT IS OBSCENE

The court below was clearly in error when it felt compelled to find that the mere fact a film was being produced shielded the illegal conduct of paying money for performed acts of sexual penetration. In the Statement of Facts from the brief for the People in the court below, reproduced in Appendix D, the uncontradicted testimony and evidence showed that Defendant Freeman specifically paid the performers he procured for certain specified sexual acts of vaginal, anal, and oral penetration. His sole intent was to

produce hard-core pornographic material to be shown to the commercial public in this nation for the purpose of drawing paying customers to view the material in order to watch these specific sex acts.

Immunizing such independent conduct under the presumption of protection for films is plain error and should be reversed. This was not a medical or artistic film or documentary on indigenous practices of certain cultures. It was a staged portrayal of hard-core sex acts for commercial voyeristic viewing. The concerns expressed in New York v. Ferber, 458 U.S. at 761-65, are applicable here as regards the separate public policy against prostituted sexual performances. Any legitimate filming of explicit sexual activity for non-commercial serious purposes can be protected on a case-by-case basis as not within the

scope of pure pandering. See: Ferber, supra at 773-74, and at 775 (Justice O'Connor, concurring).

A. The Production Of Commercial Pornographic Films By Procuring Hard-Core Sexual Performances For Money Is Not Expression Protected By The First Amendment.

Although this Court has held that obscene material is not protected by the First Amendment, Roth v. U.S., 354 U.S. 476, 484-85 (1957); Miller v. California, 413 U.S. 15, 23 (1973), and that materials not yet adjudged obscene are generally treated as presumptively protected for due process purposes, Near v. Minnesota, 283 U.S. 697 (1931); Roaden v. Kentucky, 413 U.S. 496, 504 (1973), it does not follow that paid sexual conduct involved in the making of a film is presumed protected, even if the resulting film itself may be so presumed.

The California Court of Appeal, in affirming the conviction in People v. Freeman, 233 Cal.Rprt. 510, at 511 (Cal.App.2 Dist. 1987), rejected the First Amendment argument:

> It is well settled that the distribution of a movie or book is protected by the First Amendment. However, a criminal act is not protected under the First Amendment merely because it occurs within the context of a motion picture production.
> It is immaterial to defendant's conviction that the actors and actresses may or may not obtain any sexual gratification from their participation in the sexual acts depicted in the film. The actors and actresses herein involved were employed to engage in acts of prostitution, which is defined in numerous California cases as the engaging in sexual acts for money. The people herein engaged agreed to and did engage in sexual conduct and testified that they "acted" before the cameras in the production of the motion picture herein in question "for the money they received." The guilt of the defendant of the crime charged and of which he was convicted is clear.

Several decisions had upheld application of prostitution and

pandering laws to paid performers in pornographic films. See: People ex rel. Van De Kamp v. American Art Enters., 124 Cal.App.3d 1023, 177 Cal.Rptr. 776 (1981), vacated on other grounds, 33 Cal.3d 328, 188 Cal.Rptr. 740, 656 P.2d 1170 (1983); People v. Souter, 125 Cal.App.3d 563, 178 Cal.Rptr. 111 (1981); People v. Kovner, 96 Misc.2d 414, 409 N.Y.S.2d 349 (N.Y.Sup.Ct., 1978); People ex rel. Van De Kamp v. American Art Enters., 75 Cal.App.3d 523, 142 Cal.Rptr. 338 (1977); People v. Fixler, 56 Cal.App.3d 321, 128 Cal.Rptr. 363 (1976); United States v. Roeder, 526 F.2d 736 (10th Cir. 1975), cert. denied, 426 U.S. 905 (1976); State v. Kravitz, 511 P.2d. 844 (Or.App. 1973). In one obscenity case, an Ohio appellate court noted, "It is highly improbable that some of the material herein involved could be prepared without acts of

prostitution or sodomy." The court recognized that "[i]nherent in the publication of pictorial pornography is the commission of acts. . . which are abhorrent to our national society, and are prohibited by the laws of almost all jurisdictions." State ex rel. Sensenbrenner v. Adult Book Store, 26 Ohio App.2d 183, 213, 271 N.E.2d 13, 31 (1971), aff'd, 35 Ohio St.2d 220, 301 N.E.2d 695 (1973), cert. denied, 421 U.S. 934 (1975).

The Supreme Court of California applied a flawed syllogism in reaching its conclusion in this case. As stated in People v. Freeman, 758 P.2d 1128:

> Defendant Harold Freeman hired and paid actors to perform in a nonobscene commercial film which portrayed sexually explicit acts. Id. at 1129.
>
> However, even if defendant's conduct could somehow be found to come within the definition of "prostitution" literally, the application of the pandering

statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values.
Id. at 1130.

Regardless of our view of the social utility of this particular motion picture, our analysis must begin with the premise that a nonobscene motion picture is protected by the guarantee of free expression found in the First Amendment.
Id. at 1131.

Since the acts involved here have not been adjudged obscene, they are within the protection of the First Amendment. To subject the producer and director of a nonobscene motion picture depicting sexual conduct to prosecution and punishment for pandering, including a special provision for ineligibility for probation attendant on such a conviction (see fn.2, ante), would rather obviously place a substantial burden on the exercise of protected First Amendment rights. To include the hiring and paying of actors for acting in such a film within the definition of pandering would therefore unconstitutionally infringe on First Amendment liberties.
Id. at 1132.

Under this analysis, the obscenity or serious value of a film is relevant

to whether the acts filmed were or were not illegal. The conduct and the expression of ideas about that conduct must be separate, however. A film of actual murder or child abuse may not be obscene and could well be protected when shown in a movie or on television newscasts, but the crime is not forgiven by the First Amendment. If a married couple film themselves at home on their own camera and the film is then stolen by a burglar and sold to a pornographer and shown for money as a hard-core pornographic peep show film, that film could lawfully be found obscene even though it was lawfully made. If a pimp films his prostitute servicing a customer through a secret hole in a motel door, the sexual acts are illegal because they were paid for, not because they were arousing or gratifying for the customer or the prostitute (a "john"

doesn't get a refund if it wasn't good enough). The pimp's film, however, could be obscene or not - depending on how much explicitness be used in the final editing, what he added as "filler" to provide serious artistic value. The pimp could show it uncut as a peep show film and have it be obscene or could disguise it as a medical training film and have a court find serious scientific value or lack of prurient appeal or offensiveness. The obscenity of the film and the criminality of their prostitution would be the same whether the prostitute even knew or was paid extra for the filming or whether the customer knew of the filming or not. Whatever Defendant Harold Freeman eventually would have made with the film footage he procured paid sex acts for, the act of paying for those sex acts should be condemned as pandering for

prostitution, since that is exactly what he did and intended to do and was understood by all involved to be doing.

The difference between the conduct and the expression of conduct is illustrated by the statement in Paris Adult Theatre I v. Slaton, 413 U.S. 49, at 67:

> Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engaged in a valid political dialogue.

Another practical insight into this legal issue is the discussion by Prof. Fred Schauer in his article on "Speech and Obscenity" in 67 Georgetown L.J. 899 (1979):

> Imagine a person going to a house of prostitution, and, in accord with his or her particular sexual preferences, requesting that two prostitutes engage in sexual activity with each other while he

becomes aroused. Having achieved sexual satisfication in this manner, he pays his money and leaves, never having touched either of the prostitutes. Imagine an individual who asks that a leather-clad prostitute crack a whip within an inch of his car. Are these free speech cases? Hardly. Despite the fact that eyes and ears are used, these incidents are no more cognitive than any other experience with a prostitute. It is essentially a physical activity, the lack of actual contact notwithstanding. If the above examples are not free speech cases, is there any real difference between the same activity when presented on film rather than in the flesh? Consider further rubber, plastic, or leather sex aids. It is hard to find any free speech aspects in their sale or use. If pornography is viewed merely as a type of aid to sexual satisfaction, any distinction between pornography and so-called "rubber products" is meaningless. The mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same. Neither means constitutes communication in the cognitive sense. Pornography involves neither a communicator nor an object of the communication. The purveyor of the pornography is in the business solely of providing sexual pleasure; it is unrealistic to presume that he is anything but indifferent to the method by which

> pleasure is provided and profit secured. Similarly, there is no reason to believe that the recipient desires anything other than sexual stimulation. Hard-core pornography, then, is distinguished by its similarity in all relevant respects to a wide range of other sexual experiences.
> Id. at 922-23.
>
> Running down Main Street naked may be a statement about sexual values or an appeal for casting off our sexual inhibitions by doffing our clothes. But implicit in any meaningful constitutional definition of speech as communication is the idea that one can separate advocacy of an act from the act itself, even though the act contains an element of advocacy.
> Id. at 925.

It is simply inconceivable that after centuries of public policy and public morality attempting to suppress the "crass commercial exploitation of sex", as stated in Paris, supra, 413 U.S. at 63, that acts of pandering and prostitution should come to be protected by our great Constitution because of the invention of the camera or video recorder. The law should continue to be presumed to know what everyone knows.

B. A Defendant May Be Convicted Of Pandering For Prostitution For Hiring And Paying Money To Performers To Engage In Hard-Core Sexual Conduct Before A Camera In Order To Produce A Film Intended To Be Commercially Or Publicly Promoted And The State Need Not Allege, Nor Must The Trier Of Fact Find, That The Final Film Product Is Obscene As A Matter of Fact Or Law.

The U.S. Court of Appeals for the Tenth Circuit in U.S. v. Roeder, 526 F.2d 736 (10th Cir. 1975), considered and rejected the contention that a federal Mann Act violation was immunized because the state lines were crossed to make a movie with the prostitute paid for her services in the film. As held by the court, at 739:

> We must reject the further contention of appellant that since it is a film the First Amendment not only clothes it but places it beyond the reach of the Mann Act. True, movies are forms of expression entitled to First Amendment protection, Burstyn v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), and acting in a movie is protected as well, Schacht v. United States, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44

(1970), but the First Amendment does not constitute a license to violate the law. Cf. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

The important point is that Congress is within its powers in prohibiting the interstate transportation of a woman for the purpose of prostitution. Of itself it is not a suppression of speech or expression. See United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

The court below distinguished Roeder on the ground that the federal "defendant film producer actually participated in the sexual conduct in the film". People v. Freeman, 758 P.2d at 1134-35. The U.S. Court of Appeals did not affirm on that basis and it would make no difference under the Mann Act if a pimp sexually used his girls on or off the movie set or whether he even paid them if he did. If a pimp brought his girls into another state and was paid by a businessman to have them service the businessman's clients, the

Act would be violated. If the businessman's only purpose in the arrangement was to make a movie of the prostitutes engaging in sex with each other so the businessman could watch the film later or even sell the film, the Act would still be violated.

The court below felt compelled to find a criminal act being filmed before pandering would escape First Amendment protection. In Freeman, supra at 1134, the court reasoned that "aside from the payment of the acting fees ... the sexual acts depicted in the motion picture here were completely lawful" since it was between "consenting adults in a place not open to the public". It cannot be debated that a sex act, lawful in itself-such as missionary position coitus, is made illegal during prostitution. It is the payment that is illegal, not the sex. Which sex act is

paid for is irrelevant when profit is the motive. All prostitution is done in (at least attempted) privacy but the sex is not provided because of the consent of the prostitute but because of the money of the customer. They are not consenting adults sharing a sexual experience. Anyone who doubts this need only ask for a "freebie". Prostitutes don't work for sex, they can have that whenever they want just like anyone else-and do it for free-but when they work, they work.

The state should not have to allege, nor should the trier of fact need to find, that a filmed record of such paid sex acts be obscene or this reality of prostitution would become blurred by the theoretical misapplication of the First Amendment. The California Supreme Court's finding that People v. Fixler, supra 56 Cal.App.3d

321, was erroneously decided under the First Amendment was based on its view that the payment of a minor to perform sex in pictures was not prostitution but instead was "aiding and abetting unlawful sexual intercourse with a minor". However, Fixler did not involve statutory rape, it involved prostitution of a minor. Her age made the procurement an enhanced degree of crime, her age was not an element of the prostitution. It was the payment of money that made it a crime, her age only made it worse. The obscenity of the film was not involved, and could not have changed the illegality of using the minor as a hard-core model.

Nor should the mere act of filming the young woman's exploitation relieve her procurer of liability because he intended to use the final film product to make a mockery of the First Amendment as a hard-core pornographer.

If the entire industry of prostituted acts of penetration for filming commercial pornography is to be legalized it should be the choice of the state legislature, not the result of the Constitution. Just as the states may follow a laissez faire policy and legalize obscenity, they could do the same with pandering and prostitution, "but nothing in the Constitution compels the States to do so". Paris Adult Theatre, supra, 413 U.S. at 64. The eventual obscenity of the films resulting from paying for hard-core sexual performances is simply beyond the consideration of the underlying conduct. The fruit of the poisonous tree remains spoiled as long as the tree was illegally harvested.

The ruling that the First Amendment protects the procurement of hired sex acts should, therefore, be reversed.

C. The Payment Of Money For The Performance Of Sexual Conduct In Commercial Pornographic Films Satisfies The Elements Of Prostitution, And Procuring Such Paid Sex Acts Constitutes Pandering, Regardless of Whether Sexual Arousal Or Gratification Was Intended Or Occurred On The Part Of The Performers Or The Panderer Or The Customers Expected To View The Final Film Product.

The court below restricted the reach of the California prostitution statute, Penal Code Section 647, to where there is "sexual arousal or gratification of the customer or of the prostitute". People v. Freeman, supra, 758 P.2d at 1130-31. The court relied on its prior opinion in Pryor v. Municipal Court, 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 P.2d 636 (1979), where "lewd conduct" in a public place was construed to require "sexual arousal, gratification, annoyance or offense". This construction was applied to the arousal or gratification of the prostitute or

customer in prostitution cases in People v. Hill, 103 Cal.App.3d 525, 534-35, 163 Cal.Rptr. 99 (1980). However, Pryor itself was decided on federal grounds that the First Amendment required a narrowing construction that applies the public lewdness statute only where sex acts are committed in a public place and "done with specific intent when persons may be offended". Pryor, 599 P.2d at 647. The court distinguished defendant Pryor's conduct in soliciting a lewd act from a police officer from a "lewd, dissolute or obscene communication", and therefore Pryor's conduct need not be obscene. The court did not extend its ruling that a "topless dancer" was entitled to First Amendment protection unless the dance is "obscene", as so held in In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535 (1968) (cited in Pryor, supra at 640).

This Court's ruling in Schad v. Mt. Ephriam, 452 U.S. 61, 65-66 (1981), that nude dancing cannot be treated as if it had no First Amendment protection did not, thereby, grant full protection to nude dancing unless obscene. It was recognized by this Court that the State of Indiana could constitutionally prohibit as indecent exposure the conduct of nude dancing even in bars where "consenting" customers would presumably not be "offended". The exposure of private parts in a public place was sufficient to justify regulation. Clark v. Indiana, 446 U.S. 931 (1980), Dove v. Indiana, 449 U.S. 806 (1980), affirming State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), by dismissal of the appeal for want of a substantial federal question.

By limiting the "lewd act" definition in Pryor to public acts which

offend others, and the prostitution acts in Hill to "arousal or gratification of the customer or of the prostitute", the intended arousal of paying customers expected to view the film produced by means of procured acts of hard-core sexual conduct may have been removed from the legal equation. However, the court below did reserve this opening in its state statute discussion when it refused to rule that prostitution must always involve a "customer" and limited its ruling to the extent that "in order to constitute prostitution, the money or other consideration must be paid for the purpose of sexual arousal or gratification". People v. Freeman, 758 P.2d at 1131. The court found that in this case there was "no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification, his own or the actors'".

Freeman, id. at 1131. Although the People maintain that, though the record conclusively proves that Defendant Freeman paid the performers solely for purposes of arousal of the ultimate customer who would view the film, the court failed to consider this arousal target because to do so would "impinge unconstitutionally upon First Amendment values." Id. at 1131. Such an extension of the First Amendment to preclude consideration of the voyeurism interests of the panderer, his film crew, the performers themselves, and the expected commercial consumer of the intended hard-core film is not warranted by the decisions of this Court on obscenity, either before or after Miller v. California, supra. All that should be needed to satisfy First Amendment rights when pandering is charged under state law is that the procurement be to

perform hard-core sexual conduct in exchange for money or other financial consideration in order to produce a "pornographic" film intended for commercial dissemination. This eliminates the possibility of suppressing legitimate sexual conduct or works of serious value. The conduct of paying for prostitution would then be the only conduct involved and no expression would be involved. Since it is the money which removes the privilege of the sex act from prostitution, only the paid-for sex acts could constitute pandering. The limitation of the reach of pandering to "hard-core" sexual conduct performed for money would allow simulated or "acting out" sexual themes and protect legitimate artistic expression and limit the scope to the traditional types of hard-core conduct found unprotected by this Court.

CONCLUSION

The Supreme Court of California erred in relying on the federal Constitution and decisions of this Court in reversing Defendant-Respondent's conviction for pandering. This Court should grant the Petition and allow a writ of certiorari to review the federal issues of whether state prostitution statutes are prohibited from being applied to the paying of performers to engage in hard-core sexual conduct to produce commercial pornography unless the final film product is found obscene. This may well be the singular opportunity to address this issue affecting the state and national issue of the production of hard-core

pornography through paid acts of penetration and the offense this practice imposes on public policy. Therefore, Petitioner prays that the writ be allowed.

Respectfully submitted

IRA REINER
District Attorney
County of Los Angeles

By: _____
Counsel of Record

APPENDIX A

Text of Pandering Statute,
Cal. Penal Code,
Section 266i.

California Penal Code

Pandering

Section 266i reads in full as follows: "Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years."

APPENDIX B

Opinion of
The Supreme Court of California.

Journal Entries of
The Supreme
Court of California:

1. Extension of jurisdiction
   to consider rehearing

2. Rehearing denied

3. Remittitur

Opinion of

The Supreme Court of California

in

People v. Freeman,
46 Cal.3d 419,
250 Cal.Rptr. 598,
758 P.2d 1128
(August 25, 1988)

Reprinted from
758 P.2d 1128, et seq.

46 Cal.3d 419
250 Cal.Rptr. 598

The PEOPLE, Plaintiff and Respondent,

v.

Harold FREEMAN, Defendant and Appellant.

No. S000070.

Supreme Court of California, In Bank.

Aug. 25, 1988.

Defendant was convicted in the Superior Court, Los Angeles County, James A. Albracht, J., of pandering, and he appealed. The Court of Appeal, 233 Cal.Rptr. 510, affirmed. The Supreme Court granted review, superseding opinion of Court of Appeal. The Supreme Court, Kaufman, J., held that: (1) defendant did not "procure another person for the purpose of prostitution" within meaning of pandering statute when he hired and paid actors to perform in nonobscene commercial film which portrayed sexually explicit acts, and (2) First Amendment precluded application of pandering statute to hiring of actors to perform in production of nonobscene motion picture which portrayed sexually explicit acts.

Reversed.

Lucas, C.J., and Eagleson, J., concurred in judgment.

Stuart Goldfarb and Dennis A. Fischer, Santa Monica, for defendant and appellant.

John K. Van de Kamp, Atty. Gen., Steve White, Chief Asst. Atty. Gen., Mark Alan Hart, Robert R. Anderson and Lauren E. Dana, Deputy Attys. Gen., for plaintiff and respondent.

KAUFMAN, Justice.

Defendant Harold Freeman hired and paid actors to perform in a nonobscene commercial film which portrayed sexually explicit acts. On that account he was charged with and convicted of five counts of pandering—procurement of persons "for the purpose of prostitution"—under Penal Code section 266i. He appealed contending his conduct did not constitute the crime of pandering. The Court of Appeal affirmed the judgment of conviction.

This court granted review because of First Amendment concerns and the statewide significance of the issues. Because of the language of the statutes involved and because construction of the pandering statute to make it applicable to the hiring and payment of actors to perform in a nonobscene motion picture would unlawfully impinge upon protected First Amendment rights, we are compelled to conclude the

pandering statute was not intended to and does not apply to the conduct here involved and that defendant's convictions of pandering must be reversed.

I. FACTS

Defendant Freeman is the president of Hollywood Video Production Company (Hollywood Video), which is in the business of producing and marketing "adult" films. In September 1983 defendant produced and directed a film called "Caught from Behind, Part II." Defendant hired actors and actresses to perform in the film. As part of their roles, the performers engaged in various sexually explicit acts, including sexual intercourse, oral copulation and sodomy.

All the filming was done in the private residence of Nancy Conger, and was not open to the public. Conger was paid for the use of her home in the making of the film. She also asked if she could act in the film. Defendant agreed Conger could be in the film. With the exception of Nancy Conger, all the actors and actresses in the film were cast through the World Modeling Agency operated by Jim South. Defendant paid each actor for his or her performance in the film, and paid an additional fee to South for each performer from World Modeling Agency who had been cast for a role in the film.

Defendant was charged with five counts of pandering (Pen.Code, § 266i) based on the hiring of five actresses who performed sex acts in the film.[1] Defendant was not charged with any violation of the obscenity laws (Pen. Code, § 311 et seq.) in connection with production or distribution of the film and there was no determination the film was obscene.[2]

After a jury trial, defendant was found guilty on all five counts. Defendant was placed on five years probation[3] and ordered as conditions of probation to serve 90 days in the county jail and pay restitution

1. Although both male and female actors were hired and paid and although both participated in the sexually explicit conduct, the criminal charges were based solely on the conduct of the female actors.

2. All further statutory references are to the Penal Code unless otherwise stated.

3. Section 1203.065 prohibits the granting of probation for a conviction of pandering. The trial court found, however, that imposition of a prison term would constitute cruel and unusual punishment for defendant's conduct and placed defendant on probation notwithstanding section 1203.065. The People appealed the granting of probation, which was affirmed by the Court of Appeal. Review of that decision is pending in this court in a separate proceeding (S000319, review granted Apr. 16, 1987). In view of our conclusion the judgment of conviction must be reversed because the conduct did not constitute pandering, the review of the probationary sentence will become moot.

of $10,000 under Penal Code section 1203.-04 and a $100 restitution fine under Government Code section 13967, subdivision (a).

II. DISCUSSION

The issues and contentions in this case and their resolution are pervaded by a central fact. The film was not determined to be obscene and for purposes of this review must be deemed to be not obscene. Thus the prosecution of defendant under the pandering statute must be viewed as a somewhat transparent attempt at an "end run" around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort.

A. *The Statutory Language*

[1] The pandering statute under which defendant was convicted provides in pertinent part: "Any person who: (a) procures another person for the purpose of prostitution ... is guilty of pandering, a felony...."[4] (§ 266i.)

4. Section 266i reads in full as follows: "Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years."

"Prostitution" is not defined in section 266i. Rather, the definition of "prostitution" derives from Penal Code section 647, subdivision (b): "'[P]rostitution' includes any *lewd act* between persons *for money or other consideration.*" (Italics added.)

The People argue that the actors and actresses in the film engaged in acts of prostitution—i.e., sexual acts for money—because they performed the acts before the movie cameras "for the money they received." Thus, the People argue, defendant was guilty of procuring the actors "for the purpose of prostitution." The People's syllogism is flawed in significant regards.

First, the definition of "prostitution" (and ultimately, therefore, the definition of "pandering") depends on the definition of a "lewd act." In *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 P.2d 636 this court construed the term "lewd conduct" for purposes of prosecution under section 647, subdivision (a), proscribing lewd or dissolute conduct in a public place, a provision related to the prohibition against prostitution contained in section 647, subdivision (b). In *Pryor* we held that a "lewd act" requires "touching of the genitals, buttocks, or female breast *for the purpose of sexual arousal, gratification,* annoyance or offense...." (Italics added. *Id.*, at p. 256, 158 Cal.Rptr. 330, 599 P.2d 636.) The definition of a "lewd act" for purposes of section 647, subdivision (b) evolved from *Pryor* and was applied to "prostitution" in *People v. Hill* (1980) 103 Cal.App.3d 525, at pages 534–535, 163 Cal. Rptr. 99 as follows: "[F]or a 'lewd' or 'dissolute' act to constitute 'prostitution,'

the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute.*" (Italics added.)

One contention of defendant is that requisite to the crime of prostitution is the existence of a "customer" and there being no "customer" here, no prostitution was

involved and therefore no procurement for purposes of prostitution and no pandering. We find it unnecessary to address that contention. Whether or not prostitution must always involve a "customer," it is clear that in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification.*

The payment of acting fees was the only payment involved in the instant case. This payment was made to the actors for performing in a nonobscene film. There is no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification, his own or the actors'. Defendant, of course, did not himself participate in any of the sexual conduct. Defendant, the payor, thus did not engage in either the requisite conduct nor did he have

the requisite mens rea or purpose to establish procurement for purposes of prostitution.[5]

B. *First Amendment Considerations*

[2] However, even if defendant's conduct could somehow be found to come within the definition of "prostitution" literally, the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values.

It is the duty of this court in construing a statute to ascertain and give effect to the intent of the Legislature. (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 366, 90 Cal.Rptr. 592, 475 P.2d 864; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1979) 88 Cal.App.3d 43, 53, 152 Cal.Rptr. 153.) And it is fundamental that the Legislature will not be presumed to intend unconstitutional results. (*People v. Smith* (1983) 34 Cal.3d 251, 259, 193 Cal.Rptr. 692, 667 P.2d 149; *In re Kay* (1970) 1 Cal.3d 930, 942, 83 Cal.Rptr. 686, 464 P.2d 142.) "[W]here ' "the terms of a statute are by fair and reasonable interpre-

5. There is also something tautological in the argument that the very acting fees by which defendant "procured" the actors ("for the purpose of prostitution") *also* constitute the payment necessary to establish the "prostitution" for which the actors are assertedly being "procured."

tation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.'" [Citations.]" (*People v. Davenport* (1985) 41 Cal.3d 247, 264, 221 Cal. Rptr. 794, 710 P.2d 861; accord: *United States v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 407–408, 29 S.Ct. 527, 535–536, 53 L.Ed. 836.)

Regardless of our view of the social utility of this particular motion picture, our analysis must begin with the premise that a nonobscene motion picture is protected by the guarantee of free expression found in the First Amendment. (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 502, 72 S.Ct. 777, 780, 96 L.Ed. 1098; *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 689, 68 Cal.Rptr. 721, 441 P.2d 281; *Flack v. Municipal Court* (1967) 66 Cal.2d 981, 988, 59 Cal.Rptr. 872, 429 P.2d 192; *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 824, 83 Cal.Rptr. 819, 464 P.2d 483.)

In *Barrows v. Municipal Court, supra,* 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483 this court considered the applicability of criminal penalties under the vagrancy law, section 647, subdivision (a), to the live performance of a play in a theater before an audience. Although the opinion does not detail precisely what occurred, two performers, the producer and the director of

the play apparently were prosecuted on account of sexually related conduct that occurred during the performance of the play.

We first noted that performance of a live play comes within the same First Amendment protection as motion pictures. The vagrancy law there at issue, section 647, subdivision (a), with its attendant requirement of lifetime registration as a sex offender, was allied to other sections prohibiting various kinds of sexual misconduct. Nothing in its history or context suggested that it was intended to apply to theatrical performances that came within the ambit

of the First Amendment. The criminal penalties of the statutes there at issue, if applied to a live theatrical performance, would not only have involved serious equal protection problems, but as we stated, it was "too evident to require elaboration" that such penalties "would have an inhibiting effect upon the exercise of First Amendment rights." (*Barrows v. Municipal Court, supra*, 1 Cal.3d 821, 827, 83 Cal.Rptr. 819, 464 P.2d 483.) We concluded that section 647, subdivision (a), was not intended to apply to live theatrical performances before an audience.

Since the acts involved here have not been adjudged obscene, they are within the protection of the First Amendment. To subject the producer and director of a nonobscene motion picture depicting sexual conduct to prosecution and punishment for pandering, including a special provision for ineligibility for probation attendant on such a conviction (see fn. 2, ante), would rather obviously place a substantial burden on the exercise of protected First Amendment rights. To include the hiring and paying of actors for acting in such a film within the definition of pandering would therefore unconstitutionally infringe on First Amendment liberties. Consistent with *Barrows*, *Burstyn*, *Burton* and *Flack* and consistent with the principles of statutory construction outlined above we are thus compelled to conclude that the Legislature did not intend the antipandering law to apply to the payment of acting fees for performance in a nonobscene motion picture. We observe that if section 266i were applied in the manner urged by the People, it would include within the literal sweep of the statutory language films of unquestioned artistic and social merit, as well as films made for medical or educational purposes. We reaffirm our observation in *Barrows*, "any more restrictive rule could annihilate in a stroke much of the modern theater and cinema." (*Barrows v. Municipal Court*, *supra*, 1 Cal.3d 821, 831, 83 Cal.Rptr. 819, 464 P.2d 483.)

Placing reliance on *People v. Fixler* (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, the People argue that there is a distinction between "speech" (e.g., a film), which is constitutionally protected under the First Amendment so long as it is not obscene, and "conduct" (the making of the film), which may be prohibited without reference to the First Amendment. Such a distinction is untenable in this case. In *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 the United States Supreme Court set forth standards to determine the constitutional propriety of governmental regulation of "conduct" which also contains elements of "speech." The factors to be considered are (1) whether the regulation is within the constitutional power of the government, (2) whether the governmental interest is important or substantial, (3) whether the governmental interest is unrelated to the suppression of free expression, and (4) whether the incidental restrictions on alleged First Amendment interests is no greater than is essential to the furtherance of the interest. (*Id.*, at p. 377, 88 S.Ct. at p. 1679.)

Even if the regulation attempted here were within the constitutional power of the Legislature and the governmental interest could be found to be important, the application of section 266i in the manner advocated would clearly run afoul of the requirement that the governmental interest be un-

related to the suppression of free expression. The People have advanced two possible governmental interests: First, is the prevention of profiteering from prostitution, and second is a public health purpose, e.g., prevention of the spread of sexually transmitted diseases, such as AIDS. The governmental interest served by section 266i has been stated to be the prevention of recruitment to prostitution or of augmentation of the supply of available prostitutes. (*People v. Hashimoto* (1976) 54 Cal.App.3d 862, 867, 126 Cal.Rptr. 848; *People v. Courtney* (1959) 176 Cal.App.2d 731, 741, 1 Cal.Rptr. 789.) Punishment of a motion picture producer for the making of a nonobscene film, however, has little if anything to do with the purpose of combatting prostitution. Rather, the self-evident purpose of the prosecuting authority in bringing these charges was to prevent profiteering in *pornography* without the necessity

of proving obscenity. The fact that the People concede that a film identical to that in this case could be made lawfully if the performers were not paid also belies the asserted "public health" interest. Both these suggested "interests" not only directly involve the suppression of free expression but are, in the context of a pandering prosecution for the making of a nonobscene motion picture, not credible.

The People's reliance upon *People v. Fixler, supra,* 56 Cal.App.3d 321, 128 Cal. Rptr. 363 to support defendant's conviction otherwise is also misplaced. First, the *Fixler* court failed to give sufficient consideration to the whole holding of this court in *Barrows, supra,* 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483. Secondly, *Fixler* is factually distinguishable from the instant case in a rather fundamental way. In *Fixler,* the defendants were a photo editor and photographer for American Art Enterprises, a publisher of sexually explicit magazines. The photographers obtained "models" from modeling agencies and paid fees to the models, who were photographed engaging in various types of sexual activity, from masturbation to oral copulation and sexual intercourse. The defendants in that case were convicted of pandering based on the use of one "model," a 14–year-old girl. The Court of Appeal upheld the conviction, making the flat statement that "There can be no question but that Patricia engaged in lewd acts and sexual intercourse for money ..." (*id.,* 56 Cal.App.3d at p. 325, 128 Cal. Rptr. 363) and that the defendants had therefore procured her "for purposes of prostitution."

The bald conclusion reached by *Fixler,* and reiterated in the related case of *People ex rel. Van de Kamp v. American Art Enterprises, Inc.* (1977) 75 Cal.App.3d 523, at page 529, 142 Cal.Rptr. 338, that "sexual intercourse for hire by ... models [or ac-

tors] whose activity is photographed for [publication] ... is prostitution" simply ignores the First Amendment considerations that compel our contrary conclusion here.[6]

Moreover, the *Fixler* court's conclusion was based primarily on a misinterpretation of a portion of this court's opinion in *Barrows v. Municipal Court, supra,* 1 Cal.3d 821, 830, 83 Cal.Rptr. 819, 464 P.2d 483. We there stated that "acts which are *independently prohibited by law* [cannot] be consummated without sanction ... merely because they occur during the course of a theatrical play. Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero." (Italics added.)

The *Fixler* court correctly paraphrased our language in *Barrows* in stating: "The fact that a motion picture of an actual murder, rape or robbery in progress may be exhibited as a news film or a full length

6. To the extent that *People v. Fixler, supra,* 56 Cal.App.3d 321, 128 Cal.Rptr. 363, *People ex rel. Van de Kamp v. American Art Enterprises, Inc., supra,* 75 Cal.App.3d 523, 142 Cal.Rptr. 338, and *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 115 Cal.Rptr. 528 hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering under section 266i, they are disapproved.

movie without violating the law does not mean that one could with impunity hire another to commit such a crime simply because the primary motivation was to capture the crime on film ..." (*Fixler, supra*, 56 Cal.App.3d at p. 326, 128 Cal.Rptr. 363), but erroneously concluded that the defendants there had "hired" the 14–year-old model to commit the independent crime of "prostitution." The conduct was, to be sure, independently unlawful, but it was not prostitution or the procurement of prostitution; the crime was aiding and abetting unlawful sexual intercourse with a minor in violation of section 261.5. (See also *People v. Zeihm, supra*, 40 Cal.App.3d 1085, 115 Cal.Rptr. 528 [cited in *Fixler*, in which the court states (without citation to authority) that exploitation of women in making pornographic movies is prostitution, but the gravamen of which involved the use of females under the age of consent, a violation of section 261.5].)

Undeniably, one cannot lawfully hire another to commit murder, rape or robbery for the purpose of photographing the act.

Murder, rape and robbery and aiding and abetting intercourse with a minor for that matter, are crimes independent of and totally apart from any payment for the right to photograph the conduct.

By contrast, the acts of alleged "prostitution" in this case were not crimes independent of and apart from payment for the right to photograph the performance. The determination that pandering and prostitution occurred here was entirely dependent on the payment for the right to photograph. Indeed, under the People's theory the payment was used to establish not only the "hiring" but also elements of both the "pandering" (procuring) and the "prostitution" (i.e., lewd acts "for money"). When considered aside from the payment of the acting fees, itself fully lawful otherwise, the sexual acts depicted in the motion picture here were completely lawful. The sexual conduct was between consenting adults and occurred in a place not open to the public.[7] And as we have stated, the film was not determined to be obscene.

The People also rely on a number of other California and out-of-state cases to support defendant's conviction, but in each instance their reliance is misplaced.

7. Since decriminalization in 1975, oral copulation and sodomy performed in private between consenting adults are lawful and no longer constitute independently defined crimes. (Stats. 1975, ch. 71, §§ 7, 10, pp. 133–134; Stats.1975, ch. 877, §§ 1, 2, pp. 1957–1958.) Thus *People v. Drolet* (1973) 30 Cal.App.3d 207, 105 Cal.Rptr. 824, cited in *Fixler*, does not support the result in *Fixler*.

A New York court in *People v. Kovner* (1978) 96 Misc.2d 414, 409 N.Y.S.2d 349, found a legislative intent on the part of the New York Legislature to include payment for acting in a film containing sexually explicit conduct within the definition of prostitution. However, *Kovner* relied uncritically on *Fixler*, failing to recognize that the *Fixler* conviction was based on unlawful sexual conduct with a minor.

In *People v. Maita* (1984) 157 Cal.App.3d 309, 203 Cal.Rptr. 685, a provider of live nude entertainment was convicted of multiple counts of both pimping and pandering. In affirming the convictions, the court relied on *Fixler*, and to the extent it did so its opinion is infirm. Nevertheless, *Maita* is also fundamentally distinguishable from the instant case because it did involve prostitution, the payment by members of the "theater" audience for sexual conduct with the "actors" hired by the theater owner for that purpose. Thus although the theater owner was acquitted on charges of presentation of obscene live conduct (§ 311.6), convictions for procuring persons for purposes of prostitution could properly be affirmed. The Court of Appeal held that the pimping and pandering laws did not prohibit live nude entertainment, but "that the entertainer cannot have sexual relations with the audience." (*Id.*, at p. 316, 203 Cal.Rptr. 685.) Thus, the result in *Maita* was sound,[8] but it has no application to this case.

8. It appears to us the conduct in *Maita* might also have supported a conviction of section 647, subdivision (a) [lewd conduct in a public place], but that offense was apparently not charged.

The People's reliance on an Oregon case, *State v. Kravitz* (1973) 14 Or.App. 243, 511 P.2d 844, is equally misplaced. That case, like *Maita, supra*, 157 Cal.App.3d 309, 203 Cal.Rptr. 685, involved sexual conduct between a member of the audience and a performer at the defendant's entertainment establishment.

In *United States v. Roeder* (10th Cir. 1975) 526 F.2d 736, the defendant was prosecuted for a violation of the Mann Act (18 U.S.C. § 2421 et seq.) for transporting a woman across state lines for the purpose of performing in a sexually explicit motion picture. The purpose of the Mann Act is, however, quite removed from and has no direct impact upon First Amendment activities. The Mann Act is directed to the conduct of transportation across state lines for an immoral purpose. So far as the Mann Act is concerned the identical conduct would not be criminal if done within a single state. Moreover, *Roeder* is singularly distinguishable from the instant case: There the defendant film producer actually participated in the sexual conduct in the

film, for which he transported the woman across state lines.

Thus, the cases relied upon by the People do not support a result different from that which we have reached in this case.

DISPOSITION

For the foregoing reasons, the judgment of the Court of Appeal affirming defendant's pandering conviction based solely on the payment of wages to the actresses in his film, which was not determined to be obscene, is reversed.

MOSK, BROUSSARD, PANELLI and KLINE,* JJ., concur.

LUCAS, C.J., and EAGLESON, J., concur in the judgment.

CASE HISTORY TABLE

People v. FREEMAN, 198 Cal.App.3d 292, 233 Cal.Rptr. 510
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People v. FREEMAN, 190 Cal.App.3d 180, 234 Cal.Rptr. 245
2-B016295, Feb. 2, 1987
Rev. granted, 236 Cal.Rptr. 1, 734 P.2d 562

People v. FREEMAN, 250 Cal.Rptr. 598, 758 P.2d 1128
S000070, Aug. 25, 1988
Time for grant or denial of rehg. extd. to Oct. 24, 1988

Found in:

California Reporter
Advance Sheets, Vol. 252, No. 4
Case History Table at p. 44
(West, November 25, 1988)

No. S000070

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent,

v.

HAROLD FREEMAN, Appellant,

ARGUELLES, J., DID NOT PARTICIPATE.

The motion for this court to grant a rehearing on its own motion, filed September 14, 1988, is DENIED.

SUPREME COURT
FILED

OCT 20 1988

Clerk

Deputy

Chief Justice

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

R E M I T T I T U R

To the Court of Appeal,

THE PEOPLE,

Respondent,

vs.

HAROLD FREEMAN,

Appellant.

Appellate District: SECOND

Supreme Court No. S000070

Court of Appeal No. B015697

County LOS ANGELES

Superior Court No. A805936

I, JOHN C. ROSSI, Acting Clerk of the Supreme Court of the State of California,

do hereby certify that the attached are copies of the original judgment now final, entered in the above-entitled cause on the 25th day of August, 19 88. Costs, if any, shall be taxed by the Court of Appeal.

WITNESS my hand and the seal of the Court, this 21st day of October, 19 88.

JOHN C. ROSSI, Acting
Clerk

By BESSIE WONG
Deputy

SEAL

APPENDIX C

Opinion of
The Court of Appeal
of California

The Court of Appeal of California
Second District, Division 4

in

People v. Freeman,
198 Cal.App.3d 292,
233 Cal.Rptr. 510
(January 6, 1987)

Reprinted from
233 Cal.Rptr. 510, et seq.

The PEOPLE, Plaintiff and Respondent,

v.

Harold FREEMAN, Defendant and Appellant.

B015697.

Court of Appeal, Second District, Division 4.

Jan. 6, 1987.

Review Granted April 16, 1987.

Defendant was convicted in the Superior Court, Los Angeles County, James A. Albracht, J., of violating pandering statute, and he appealed. The Court of Appeal, Kingsley, Acting P.J., held that: (1) act of procuring actresses and actors to perform in sexually explicit film was not protected under First Amendment merely because it occurred within context of motion picture production, and (2) defendant who procured actresses and actors to perform in sexually explicit motion picture was guilty of pandering regardless of any sexual gratification the actors and actresses may have obtained from their participation in the sexual acts depicted in the film.

Affirmed.

Arguelles, J., filed concurring opinion.

McClosky, J., filed dissenting opinion.

John K. Van de Kamp, Atty. Gen., Mark Alan Hart and Lauren E. Dana, Deputy Attys. Gen., for plaintiff and respondent.

Stuart Goldfarb, Beverly Hills, for defendant and appellant.

KINGSLEY, Acting Presiding Justice.

Defendant is a motion picture producer. He produced a film entitled, "Caught From Behind, Part II." This was a picture containing numerous explicit sexual acts and defendant was prosecuted under section 266i of the Penal Code [1] for procuring actresses and actors to perform in said picture. We affirm his conviction.

1. Penal Code section 266i reads: "Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give,

any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years."

I

[1] Much of appellant's opening brief is devoted to a discussion of the application of

the First Amendment. That discussion is out of place in this appeal. It is well settled that the distribution of a movie or book is protected by the First Amendment. However, a criminal act is not protected under the First Amendment merely because it occurs within the context of a motion picture production.

II

[2] It is immaterial to defendant's conviction that the actors and actresses may or may not obtain any sexual gratification from their participation in the sexual acts depicted in the film. The actors and actresses herein involved were employed to engage in acts or prostitution, which is

defined in numerous California cases as the engaging in sexual acts for money. The people herein engaged agreed to and did engage in sexual conduct and testified that they "acted" before the cameras in the production of the motion picture herein in question "for the money they received." The guilt of the defendant of the crime charged and of which he was convicted is clear.

The judgment is affirmed.

ARGUELLES, Associate Justice, concurring.

I concur.

People v. Fixler (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, and *People ex rel. Van de Kamp v. American Art Enterprises, Inc.* (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, have unequivocally held that sexual intercourse for hire by models whose activity is photographed for publication is prostitution. *Fixler* specifically approved the use of Penal Code section 266i to prosecute a photographer and a photo editor of a pornographic firm for the hiring of a young female, for photographic purposes, to engage in lewd acts and sexual intercourse with another male. There is no essential difference between the taking of still photographs for publications and filming for the production of motion pictures.

The dissent interprets *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 83 Cal.

Rptr. 819, 464 P.2d 483, as clothing the defendant with First Amendment protection from prosecution under California's common pandering statute. Yet a unanimous court of our own District in *Fixler* cites *Barrows* as authority for a different principle of law, stating: "The California Supreme Court held in *Barrows v. Municipal Court* ..., that acts which are independently prohibited by law cannot be consummated without sanction merely because they occur in a theatrical setting and we conclude they cannot be consummated without sanction because they occur in the course of preparing material which may ultimately be exhibited in a manner protected by the Constitution. [Citations.]" (*People v. Fixler, supra*, 56 Cal.App.3d at p. 326, 128 Cal.Rptr. 363.)

"The prosecution [for violating section 266i] here was based on conduct and was not aimed at prohibiting any communication of ideas. The manner of obtaining the photographs and the ultimate use to which those photographs might be put are separate and unrelated issues. While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which the material was originally obtained, where a crime is committed in obtaining the material, the protection afforded its dissemination would not be a shield against prosecution for the crime committed in obtaining it." (*People v. Fixler, supra*, 56 Cal. App.3d at pp. 325–326, 128 Cal.Rptr. 363.)

The Supreme Court's majority decision in *Barrows, supra*, was directed to interpreting Penal Code sections 647, subdivision (a), and 311.6, in the context of live theatrical performances. I do not view *Barrows* so broadly as to afford the cloak of First Amendment protection to actual illegal prostitution activities. In my judgment, the procurement for money of models to perform the acts involved in the case before us clearly falls within the ambit of section 266i.

McCLOSKY, Associate Justice, dissenting.

I respectfully dissent.

In *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 689, 68 Cal.Rptr. 721, 441 P.2d 281, our Supreme Court, citing *Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, concluded that "[i]t can no longer be questioned that expression by means of motion pictures is included within the free speech and press guarantees of the First and Fourteenth Amendments."

Barrows v. Municipal Court (1970) 1 Cal.3d 821, 830–831, 83 Cal.Rptr. 819, 464 P.2d 483, was a case in which two actors of a play entitled "The Beard," allegedly involving lewd conduct and speaking obscene

words, were charged with violating Penal Code sections 647, subdivision (a) and 311.6, for the performance of the lewd conduct and the utterance of those words. The play's producer and director were charged with wilfully and unlawfully aiding and abetting them in committing those violations. All four defendants petitioned for a writ of prohibition to restrain the respondent court from proceeding to trial. The California Supreme Court reversed the trial court's denial of the writ with directions to issue the writ of prohibition as prayed for.

In doing so, the *Barrows* court first explained that it began "with the premise that live plays performed in a theater before an audience are entitled to the same protection under the First Amendment as motion pictures...." (1 Cal.3d at p. 824, 83 Cal.Rptr. 819, 464 P.2d 483.) It concluded that "such [theatrical] performances do not fall within the purview of [the vagrancy law] section 647, subdivision (a)." (*Id.*, at p. 829, 83 Cal.Rptr. 819, 464 P.2d 483.) It also held that "the conclusion is inescapable under these circumstances that theatrical performances are not included within the prohibition of [Penal Code] section 311.6." (*Id.*, at p. 830, 83 Cal.Rptr. 819, 464 P.2d 483, fn. omitted.)

The *Barrows* court went on to explain:

"Our holding here does not suggest that acts which are independently prohibited by law may be consummated without sanction on the stage merely because they occur during the course of a theatrical play.

Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero. Neither do we intend to imply, however, that conduct or speech in a theatrical production is to be judged by the same standards as conduct or speech occurring on the street or other public place. *Giannini* [*In re Giannini* (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535] makes it clear that 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.2d at p. 572 [72 Cal.Rptr. 655, 446 P.2d 535].) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theater and cinema. The loss to culture and to First Amendment rights would be equally tragic." (1 Cal.3d at pp. 830–831, 83 Cal.Rptr. 819, 464 P.2d 483.)

While the motion picture "Caught From Behind, Part II" may be of little value to our culture, the record does not reflect that petitioner has been charged with or found to have violated any obscenity law. I cannot conclude that the purpose of the Legislature in enacting Penal Code section 266i was to prevent the production or distribution of theatrical plays or motion pictures depicting sex acts between consenting

adults. Had it wished to do so the Legislature could have added the production of such plays or films to the list of proscribed acts and conduct listed in that section. It did not do so. It is not our right to interpret a criminal statute broadly to aid a finding of guilt, especially where to do so invades a First Amendment protection. It is plain to me that the defendant's purpose here was to profit from making a motion picture and not "to procure a person, or attempt to procure a person, for the purpose of prostitution" within the meaning of Penal Code section 266i.

The concurring opinion relies in large measure on *People v. Fixler* (1976) 56 Cal.

App.3d 321, 324, 326, 128 Cal.Rptr. 368, to limit the holding of *Barrows*. *Fixler* involved "essentially ... the use of ... a 14 year old girl who was hired ... to perform ... in return for money ..." depraved and perverted sex acts which were photographed and were allegedly to be published in a magazine. The difficulty with taking that position is that *Fixler* focuses on only one part of the *Barrows* formulation in quoting *Barrows* as stating " 'that acts which are independently prohibited by law cannot be consummated without sanction merely because they occur in a theatrical setting and we conclude they cannot be consummated without sanction because they occur in the course of preparing mate-

rial which may ultimately be exhibited in a manner protected by the Constitution. [Citations.]' "

Neither *Fixler* nor the lead or concurring opinions deal with the equally important language in *Barrows* that states "[n]either do we intend to imply, however, that conduct or speech in a theatrical production is to be judged by the same standards as conduct or speech occurring on the street or other public place" and goes on to cite *In re Giannini, supra*, 69 Cal.App.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535, for the proposition that " 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.App.2d at p. 572 [72 Cal.Rptr. 655, 446 P.2d 535].) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theatre and cinema. The loss to culture and to First Amendment rights would be equally tragic." (1 Cal.3d at pp. 830, 831, 83 Cal.Rptr. 819, 464 P.2d 483.)

I don't think *Barrows* can be discussed fairly without considering its entire holding. More importantly, I don't see how we can be obedient to the principle of stare decisis if we disregard an important part of the Supreme Court's holding in *Barrows*. The *Barrows* court recognized that such

serious crimes as murder, rape and maiming are excluded from the protection of the First Amendment but reaffirmed the portion of *Giannini* that held that "acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene." (69 Cal.App.2d at p. 572, 72 Cal.Rptr. 655, 446 P.2d 535.)

In his dissent in *Barrows*, Justice Burke expressed his view that the effect of the holding in that case "is to allow acts, however obscene, to be performed on the stage with complete immunity unless they are proscribed by other statutory provisions." (1 Cal.3d at p. 831, 83 Cal.Rptr. 819, 464 P.2d 483.) Even if that be so, *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937, makes clear that it is not the prerogative of an intermediate court to attempt to overrule a majority opinion of the Supreme Court. *Auto Equity Sales* requires us to follow the rule of *Barrows*. I therefore cannot concur in either the lead or concurring opinion.

I think also that the import of *Barrows* forecloses the distinction the lead opinion attempts to draw between the *production* of the motion picture and its *distribution*, attempting to afford the protection of the amendment to the distribution while with-

holding its protection from the production. *Barrows* makes no such distinction. In that case the Supreme Court held that the producer's petition for the writ of prohibition should have been granted along with that of the director and actors. It is true that the producer and director in *Barrows* were charged only with aiding and abetting the actors in committing the violations, but the principle is the same and reflects the truth that the production of a motion picture is but an integral step from the conception of the idea of a film or a play to its viewing by an audience. It is obvious that the strictures of the First Amendment may be just as effectively violated by penalizing

production as by penalizing distribution or viewing.

I would, therefore, reverse.

APPENDIX D

STATEMENT OF FACTS

Taken from the brief for the People, Plaintiff-Respondent in the Supreme Court of California, entitled RESPONDENT'S BRIEF, filed by the Attorney General of California.

This brief is referred to herein as the People's Brief with the page numbers corresponding to those in the brief as filed in the court below.

(People's Brief p.2)

STATEMENT OF FACTS

During September of 1983, Dana Alper was employed by Hollywood Video Production Company as a production manager and worked on a film entitled "Caught From Behind, Part II." Appellant was the president of the company and he also directed the scenes in the film. The film involved scenes of vaginal intercourse, anal intercourse and oral copulation. (R.T. pp. 497-498, 501, 503.) On September 8, 1983, Nancy Conger (People's Brief p.3) entered into an agreement with appellant for the rental of her residence in Rancho Palos Verdes to shoot the film on September 9, 10, 11, 1983. Ms. Conger asked appellant if she could perform in the film and she was hired to be in the film for $200. (R.T. pp. 481-484, 493.)

Rosemary Bellmas was told by her agent, Jim South, in August 1983, to contact appellant regarding a part in the movie. She met with appellant in his office in September. He gave her a copy of the script and offered her the part of Mrs. Proctor for a fee of $400. She was told some scenes would involve sexual activities. Ms. Bellmas negotiated her salary directly with appellant, not Mr. South. She agreed to perform in the movie for the purpose of receiving the money. (R.T. pp. 513-518, 533.)

Jeanette Murcado received a telephone call from appellant, whom she had known for a long time, in early September asking whether she wanted to be in the film. She went to his office and read the script and discussed it with appellant. She was asked to play the part of Mrs. Sheldon, which would

involve performing sexual acts. She agreed to do the film for $300. (R.T. pp. 418-419, 421-422, 427-428, 434, 446-447.)

Rhonda Gary and Mary Ulanskas were told by their agent, Jim South, about interviewing with appellant for the film "Caught From Behind, Part II." (R.T. pp. 538, 391.) Ms. Ulanskas went to appellant's office, Hollywood Video, to interview for the movie. She quoted how much money she was making at the that time, and appellant told her she was worth more than that. He took a nude photograph of her and told her there was not an opening in (People's Brief p.4) the film at the present time, but that if he could use her, he would call. Appellant called her on September 9 and said he had an opening in the film if she wanted it. He said he would pay her $300 and she agreed. She was not a

member of Screen Actors Guild. (R.T. pp. 567, 591-594.) Ms. Gary contacted appellant and went to his office for an interview. Appellant took a nude photograph of her and told her he would call her if she got the part. Appellant contacted her later and told her should could be in the film. (R.T. pp. 538-543.) Ms. Gary did the movie to get paid and in order to get paid, the script required her to perform sexual acts. (R.T. pp. 564-565.)

Ms. Bellmas, Ms. Murcado, Ms. Gary and Ms. Ulanskas were told to go to a Hughes market where someone who worked for appellant met each of them and took them to Ms. Conger's residence to shoot the film. (R.T. pp. 429-433, 519-520, 544-545, 594-595.)

Ms. Bellmas engaged in sexual acts with Eric Edwards in the upstairs bedroom during the filming of the movie.

They engaged in intercourse whereby Mr. Edwards inserted his penis inside her vagina. They engaged in oral copulation, each placing their mouth on the sexual organ of the other. Appellant directed the scene. (R.T. pp. 520-521.) Ms. Bellmas engaged in sexual acts with Mr. Edwards in another scene the next day, in which there was sexual intercourse, oral copulation and anal sex. Appellant did close-up camera work. Ms. Bellmas was paid by appellant who paid her an extra $50 a day because he told her she (People's Brief p.5) did a very good job. (R.T. pp. 523-525.) Ms. Bellmas performed in the movie for the money. (R.T. p. 533.)

Ms. Murcado performed sexual acts with Eric Edwards and Ron Jeremy for the film. Appellant was present during the filming. She performed anal intercourse and a penis was inserted inside her

rectum. She did not want to do anal sex and did not enjoy it but it was in the film and she knew that she had to do it in order to get paid. She was paid by appellant. (R.T. pp. 434-435, 439-444, 471.) Ms. Murcado was not a member of any acting unions. (R.T. pp. 464-465.)

Ms. Conger performed sexual acts during the filming of the movie under the direction and supervision of appellant. One sexual act involved a male inserting his penis into her rectum. Another involved oral copulation. Appellant told them what acts to perform although the oral copulation was partly improvised. She was paid by appellant. (R.T. pp. 484-491.)

Ms. Ulanskas had sexual intercourse with one male, in which he inserted his penis inside her vagina, and anal sex with another where the male inserted his

penis into her rectum during the making of the film. Appellant directed the sex scenes, telling them what to do. (R.T. pp. 597-599, 603.)

During the filming of the movie, Ms. Gary performed sexual acts with Mr. James. The acts involved oral copulation where Mr. James placed his penis inside Ms. Gary's mouth, and anal sex where Mr. James placed his penis in her rectum. Appellant directed the positions while the acts were performed. (People's Brief p.6) Ms. Gary went there to get paid and to get paid she had to perform sexual acts with Bobby. (R.T. pp. 546-547, 564-565.)

Ms. Murcado, Ms. Bellmas, Ms. Gary and Ms. Ulanskas did not pay any fee to Mr. South in connection with being in the film. (R.T. pp. 462-463, 533, 563, 601.) They all signed a model release form to get paid. The document stated

that they were independent contractors and they gave up all claims to any possible revenues or money, giving appellant all rights. (R.T. pp. 465-466, 493, 496, 525-528, 555, 599.)

DEFENSE

Jean Freeman was married to appellant. She was responsible for accounts payable for Hollywood Video Production Company. Appellant was president of the company and producer and director of "Caught From Behind, Part II." She paid fees to Jim South and World Modeling Agency for his services in obtaining actors and actresses for the film "Caught From Behind, Part II." The normal arrangement is for the modeling agency to charge $40 per day per actor. she normally signs the checks. (R.T. pp. 604-607.) Appellant signed Jeanette Murcado's and Rhonda Gary's checks. The

checks were not negotiated through the bank, and the girls were paid in cash after they endorsed the checks. The checks were the company's receipts. (R.T. pp. 607-609.)

Paul Thomas acted in the film "Caught From Behind, Part II." He obtained the part through his agent, Jim South, of the World Modeling Agency. He performed sexually explicit acts. The sexual scenes were not simulated. He was performing as an actor. (People's Brief p.7) He is a member of several acting unions. (R.T. pp. 610-611, 622.)

Ron Jeremy has acted in both adult and non-adult productions. He performed in "Caught From Behind, Part II" produced and directed by appellant. He heard about the film from Jim South. He performed anal intercourse and made penetration with his penis into a woman's rectum and thinks he did oral

copulation. He had made approximately 350 films such as this. He performed what was in the script. He was performing as an actor and he was paid by appellant. (R.T. pp. 623-626, 630-631.)

APPELLANT'S CONTENTIONS

1. Appellant cannot be properly convicted of pandering pursuant to section 266i of the Penal Code for hiring actors and actresses to engage in sexual acts for the purpose of making a movie, and the Court of Appeal's opinion is in conflict with Barrows v. Municipal Court (1970) 1 Cal.3d 821, and the protection afforded by the First Amendment.

2. The majority's reliance upon People v. Fixler (1976) 56 Cal.App.3d 321 is erroneous, and the statute cannot be applied to the production of a nonobscene motion picture.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for a Writ of Certiorari were served upon counsel for Defendant-Respondent on this 19th of December, 1988, by placing them in the U.S. Mail, first-class postage prepaid, addressed to the following:

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All parties required to be served have been served.

Counsel of Record
for Petitioner

Supreme Court, U.S.
FILED
FEB 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1054

In The

Supreme Court of the United States

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

HAROLD FREEMAN,
Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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No. 88-1054

In The

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF OF PETITIONER

This Supplemental Brief discusses intervening matter affecting consideration of the Petition for a Writ of Certiorari filed December 19, 1988, by the People of the State of California. No brief in opposition was filed by Defendant-Respondent Harold

Freeman. This case is presently calendered for conference discussion by the Court on Friday, February 17, 1989.

Since the filing of the Petition, the People moved the California Supreme Court for recall of its mandate and for a stay. This motion was denied on January 20, 1989. On January 25, 1989, the People filed a motion for stay with the trial court, the Superior Court of Los Angeles County. On January 26, 1989, the People, Petitioner herein, applied to Justice O'Connor as Circuit Justice for an order staying the enforcement of the mandate and staying the trial court from dismissing this case from its docket. On February 1, 1989, Justice O'Connor issued an opinion in connection with the denial of the application. (Copy in Appendix hereto.) On February 3, 1989, the Superior Court of Los Angeles, Department M in Van

Nuys, Judge Alan B. Haber, continued the case on its docket until March 7, 1989, and stated in its Minute Order: "The Court finds that the 60 days to bring defendant to trial began to run from 1-6-89. The Court orders that an order of dismissal shall be entered on 3-7-89 unless this Court is told by the United States Supreme Court not to enter such dismissal."

In her opinion denying the Petitioner's application for stay, Justice O'Connor found that it would be "unlikely that four Justices would vote to grant certiorari" because "the decision of the California Supreme Court rests on an adequate and independent state ground". The opinion of Justice O'Connor noted the interpretation placed by the California Supreme Court on the state pandering for prostitution statute, Penal Code Section 266i, as

requiring sexual contact "for the purpose of sexual arousal or gratification of the customer or of the prostitute", quoting People v. Hill, 103 Cal.App.3d 525, 534-35 (1980). Justice O'Connor found the First Amendment considerations to be confined to the second subsection of the California Supreme Court's decision, regarding the requirement that the state prove and the trial court find the ultimate product to be an "obscene" film as well as proving the new elements of pandering for prostitution. Justice O'Connor stated that a reversal by this Court could be advisory because the California Supreme Court would "still reverse Freeman's conviction on state statutory law grounds".

The People respectfully disagree with this assumption and allege that a reversal by this Court would not result

in the same judgment being rendered by the California Supreme Court after being corrected in its views on the federal issue.

First, this Court should hold that the First Amendment does not require the filmed product to be obscene for prostitution laws to be violated in its making, as was the law prior to the decision below. See: People v. Souter, 125 Cal.App.3d 563, 178 Cal.Rptr. 111 (1981); People v. Kovner, 409 N.Y.S.2d 349 (N.Y. Sup. Ct., 1978); People v. Fixler, 56 Ca.App.3d 321, 128 Cal.Rptr. 363 (1976); United States v. Roeder, 526 F.2d 736 (10th Cir. 1975), cert. den. 426 U.S. 905 (1976).

This holding alone would dramatically change the judgment on remand.

Even if the California Supreme Court adhered to its application of

People v. Hill's pure prostitution arousal factors to hard-core pornographic filming (rather than applying the Souter-Fixler rule of sexual conduct for compensation), the re-trial of this cause would be different only in proving arousal or gratification. Under the present judgment, a retrial must involve proof of arousal or gratification of the actors or the producer during the sex acts and obscenity of the film after the sex acts were made into a movie. This change alone is not the "same judgment" and is an error purely and solely based on an erroneous application of federal law by the California Supreme Court.

Such a ruling by this Court, and such a remand decision by the California Supreme Court, would also greatly change the future course of this important issue since the California General

Assembly would be free to define the elements of pandering in filmmaking without requiring proof of obscenity and even without proof of arousal or gratification (since these were added elements of live prostitution under People v. Hill not required by the First Amendment).

It should also not be assumed that the California Supreme Court would still reverse on the basis of its prior decision on the prostitution elements if this Court reversed. It is not clear from the face of the opinion below that state law compelled the reversal of Freeman's conviction and, therefore, it was not adequate under Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). The California Supreme Court below, in People v. Freeman, 46 Cal.3d 419, 425, 758 P.2d 1128, 1131 (1988), stated that even if it could sustain Freeman's

conduct as pandering, it felt compelled to reverse the conviction because of its strict view of First Amendment application as protecting this conduct. The Court below said it must reverse because "the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would infringe unconstitutionally upon First Amendment values". Ibid.

Since the California Supreme Court felt compelled by federal law to reverse in any event, its view of what elements to apply to pandering were also applied too strictly. But for its view of First Amendment values in the filming content, it could have applied the sex acts for money rule of Souter-Fixler as applied by the Court of Appeals below at 198 Cal.App.3d 292, 233 Cal.Rptr. 510 (1987).

As discussed in the Petitioners' Supplemental Brief of Karen Applegate, et al., filed in Applegate v. Freeman, No. 88-1050, on or about February 13, 1989, the California Supreme Court once before ruled on the elements of pandering in filmmaking in its denial of a hearing to the Court of Appeal decision in People v. Souter, supra. The affirmance of the charges against James Souter, in a case "on all fours" with those against Harold Freeman, involved a limiting construction by the Court of Appeal that was still binding on the Superior Court at the time of Harold Freeman's trial and its rule was applied to affirm the instant conviction. See: People v. Freeman, supra, 198 Cal.App.2d 292, 233 Cal.Rptr. 510, 511 (1987) (copy in appendix to People's Petition.) Although the Court of Appeal below could not cite to

Souter, for the reasons discussed in the Applegates' Supplemental Brief, the rule was the same. Since the People could not cite Souter, or argue its application, before the California Supreme Court in support of Freeman's conviction, it is highly doubtful that the California Supreme Court considered its previous ruling in Souter.

The California Supreme Court may have replaced the Souter-Fixler rule with that of People v. Hill because of its view of First Amendment restrictions on this conduct, but this Court should allow the court below to re-consider the application of Souter-Fixler after correcting its holding. The First Amendment does not require that obscenity be proven in film-pandering cases, nor that arousal be required on the part of the "prostitute" or the "pimp" who produces a hard-core

pornographic film. Relieved of the error that the perceived First Amendment requirement forces the result reached below, the California Supreme Court could abandon its People v. Hill restrictions and re-apply its ruling involved in denying a hearing in Souter.

The Souter case came before the California Supreme Court in 1981-82 on mandatory, not discretionary, review and the elements of People v. Hill (1980) were not applied by the Court below at that time. Not until Freeman in 1988 did the California Supreme Court feel it must decide the case "the way it did because it believed that federal law required it to do so", and therefore its 1988 ruling is not independent of its view of the First Amendment and its decision below does not rest on adequate, nor irreversible, state

grounds under Michigan v. Long, supra at 1041.

CONCLUSION

Since any re-trial, or even a new statute for California, will depend entirely on whether this Court reverses the California Supreme Court's opinion that the First Amendment requires proof of obscenity in pandering-filmmaking cases, the reversal of that requirement will prevent the same judgment from being issued on remand.

This Court should reverse the decision below and hold that neither obscenity nor arousal need be proven where the conduct is procurring explicit sexual acts for hire to make films. The removal of any First Amendment requirement in this regard would allow the courts below to interpret state law without reference to obscenity and would allow the legislature and the courts to

abandon the rule of People v. Hill in filmmaking cases and return to the rulings in People v. Souter and People v. Fixler, supra.

For these reasons, the Petition for a Writ of Certiorari should be granted, and the writ issued to the courts below in order to prevent the Superior Court from dismissing the case from its docket, or ordering that a retrial begin, on March 7, 1989.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. A-602 (88-1054)

CALIFORNIA *v.* HAROLD FREEMAN

ON APPLICATION FOR STAY

[February 1, 1989]

JUSTICE O'CONNOR, Circuit Justice.

The State of California requests that, as Circuit Justice, I stay the enforcement of the judgment of the Supreme Court of California pursuant to 28 U. S. C. § 2101(f) pending the disposition of a petition for certiorari (No. 88-1054) to review that judgment. Because I think it unlikely that four Justices would vote to grant certiorari, see *Hicks* v. *Feiock*, 479 U. S. 1305, 1306 (1986) (in chambers opinion), I deny the application for issuance of a stay.

In its petition for certiorari, California seeks review of the State Supreme Court's judgment reversing the conviction of respondent Freeman for pandering under California Penal Code § 266i. *People* v. *Freeman*, 46 Cal. 3d 419, 758 P. 2d 1128 (1988). Freeman is a producer and director of pornographic films who hired and paid adults to perform sexual acts before his film cameras. In 1983, Freeman was arrested and charged with five counts of pandering based on the hiring of five such performers. He was not charged with violation of any of California's obscenity laws. Freeman was tried before a jury and convicted on all five counts of pandering; the State Court of Appeal affirmed the judgment of conviction. *People* v. *Freeman*, 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1988).

On discretionary review, the California Supreme Court first considered the relevant statutory language of the State Penal Code. In relevant part, § 266i of the Penal Code provides that a person is guilty of felonious pandering if that per-

son "procures another person for the purpose of prostitution . . . ." Prostitution, in turn, is defined in § 647(b) of the Penal Code as "any lewd act between persons for money or other consideration." Finally, "'for a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute.*'" 46 Cal. 3d, at 424, 758 P. 2d, at 1130 (emphasis in original), quoting *People* v. *Hill*, 103 Cal. App. 3d 525, 534–535, 163 Cal. Rptr. 99, 105 (1980).

Interpreting these definitions of terms relevant to the state pandering statute, the State Supreme Court held that "in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification.*" 46 Cal. 3d, at 424, 758 P. 2d, at 1131 (emphasis in original). Applying this principle to Freeman, the court characterized the payments made to the performers as "acting fees" and held that "there is no evidence that [Freeman] paid the acting fees for the purposes of sexual arousal or gratification, his own or the actors'." *Id.*, at 424–425, 758 P. 2d, at 1131. Thus, the court held, "[Freeman] did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution." *Ibid.* In the succeeding section of its opinion, the California Supreme Court went on to observe that "even if [Freeman's] conduct could somehow be found to come within the definition of 'prostitution' literally, the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values." *Ibid.*

California, in its petition for certiorari, would have us review this First Amendment holding of the State Supreme Court. I recognize that the State has a strong interest in controlling prostitution within its jurisdiction and, at some

point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed. I do not, however, think it likely that four Justices would vote to grant the petition because in my view this Court lacks jurisdiction to hear the petition. It appears "clear from the face of the [California Supreme Court's] opinion," *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), that its analysis of the pandering provision of the State Penal Code constitutes an adequate and independent state ground of decision. Interpretations of state law by a State's highest court are, of course, binding upon this Court. *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). Here, the California Supreme Court has decided that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under § 266i of the California Penal Code. That is an adequate ground for reversing Freeman's conviction.

As I read the State Supreme Court's opinion, it is independent of federal law as well. This Court has held that, where a state court has "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did . . . we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide . . . 'suits according to its own local law.'" *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977), quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950). This does not appear to be such a case.

The discussion section of the California Supreme Court opinion is divided into two subsections, the first titled "The Statutory Language," the second titled "First Amendment Considerations." The state court's discussion of the language of the Penal Code, which concludes with the clear holding quoted above, is not "interwoven with the federal law."

Michigan v. *Long*, *supra*, at 1040. Discussion of federal law—specifically the First Amendment—is strictly confined to the second subsection and constitutes an independent alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory law grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid. *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

There is language early in the California Supreme Court's discussion section observing that "the prosecution of [Freeman] under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort." 46 Cal. 3d, at 423, 758 P. 2d, at 1130. Nevertheless, in light of the subsequent clear holding based exclusively on the state pandering statute, as well as the State Supreme Court's doubts in its discussion of the First Amendment whether "[Freeman's] conduct could *somehow* be found to come within the definition of 'prostitution' literally," *id.*, at 425, 758 P. 2d, at 1131 (emphasis added), I conclude that the state court's statutory holding is independent from its discussion of the First Amendment and was not driven by that discussion. Because the decision of the California Supreme Court rests on an adequate and independent state ground, the State of California's application for a stay of enforcement of the judgment of the California Supreme Court is denied.

So ordered.

CERTIFICATE OF SERVICE

Three copies of the foregoing Supplemental Brief of Petitioner were served upon counsel for Defendant-Respondent on this 14th day of February, 1989, by placing them in the U.S. Mail, first-class postage prepaid, addressed to the following:

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